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Supreme Court of the United States

OCTOBER TERM, 1942.

Docket No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors, etc. and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

—against—

WILLIAM D. KELLY, State Tax Commissioner of New Jersey,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

Opinions of the State Courts.

The opinion of the Prerogative Court (R. 28-52) is officially reported in 129 N. J. Eq. 186. The opinion of the Supreme Court of New Jersey (R. 62) is officially reported in 127 N. J. L. 468. The opinion of the Court of Errors and Appeals (R. 66) is officially reported in 129 N. J. L. 127.

Of these opinions, the only one which states the facts and discusses the questions of law is that of Vice-Ordinary Buchanan in the Prerogative Court. The Supreme Court merely approved and in effect

adopted the opinion of the Prerogative Court. The Court of Errors and Appeals affirmed, "generally for the reasons expressed in the opinion delivered by the late Vice-Ordinary Buchanan", with the addition of a few observations directed toward a part of the case which is not under review on this appeal.

Grounds of Jurisdiction.

A statement as to the jurisdiction of this Court has already been filed in compliance with paragraph 1 of Rule XII, and probable jurisdiction was noted by this Court on February 15, 1943 (R. 80).

The appeal is taken under Judicial Code, Section 237(a), as amended by the Acts of January 31, 1928, and April 26, 1928, from a final judgment of the Court of Errors and Appeals of New Jersey upholding the validity of a statute of said state, which was drawn in question on the ground of its being repugnant to the Constitution of the United States.

Statement of the Case.

The proceeding was commenced by the appellants in the Prerogative Court of New Jersey by petition of appeal to review the action of the State Tax Commissioner in levying a transfer inheritance tax payable on the death of George W. E. Atkins, a New Jersey resident, who died in 1936 (R. 24). The appellants are the executors under the will of said decedent, and the individual appellants are also beneficiaries both under said will and under an irrevocable trust agreement executed by the decedent in 1929, seven years before his death. A copy of the trust agreement was annexed to the petition of appeal (R.

18-23). The Tax Commissioner included the trust fund held under said agreement as part of the property to be assessed as subject to tax, and levied a tax upon the appellants measured, in part, by their interest in such trust fund (R. 24-25).

The trust agreement was executed by the decedent in the City and State of New York, with Central Hanover Bank and Trust Company, a corporation of that state, as trustee (R. 27). Securities having a par value of more than $389,000 were simultaneously transferred to the said company to hold in accordance with the terms of the trust (R. 24). Those securities were already in New York, having been held by the trust company in a safekeeping account for the grantor, and most, if not all, of them had been so held for five years previously (R. 26); and the assets constituting the trust fund from time to time always remained in New York, and all acts of the trustee in administration of the trust were performed there (R. 27). At all times the assets consisted entirely (with negligible exceptions) of investments such as bonds, stocks, mortgages and cash (R. 26-27). The indenture contained a clause providing that it should be construed "according to the laws of the State of New York where it is made and where it is to be enforced" (R. 22). No power was reserved to the grantor, either of revocation, of amendment, or of appointment, or of any control over the administration of the trust.

By the terms of the trust indenture, the income from the trust fund was payable to the grantor for life, and thereafter to his wife; and upon the death of the survivor, the trustee was directed to pay one-half of the principal to each of his two sons if then living, with other dispositions in case either or both

of the sons should then have died (R. 20). The grantor's wife predeceased him and both of the sons survived him. The contingencies upon which the principal of the trust fund might become payable to them being thus fulfilled upon the death of the grantor, the sons thereupon became entitled to receive such principal in equal shares. These sons, the individual appellants, were then and still are nonresidents of New Jersey; George Chew Atkins residing at Bronte, Ontario, and John Norton Atkins residing at the time of the decedent's death at Sewanee, Tennessee (R. 13), but having since moved to Richmond, Virginia.

The additional amount of tax imposed upon the appellant, George Chew Atkins, by reason of the inclusion of this trust fund in the property assessed for transfer inheritance tax, is $8,133.59 and that imposed upon John Norton Atkins is $8,227.99, the difference being due to a variation of rates caused by unequal interests in the property passing under decedent's will (R. 24-25).

The Prerogative Court upheld the Tax Commissioner's determination, and the appellants prosecuted a writ of certiorari in the Supreme Court, where the tax was again affirmed. The judgment of the Supreme Court was again affirmed, upon appeal, by the Court of Errors and Appeals. In all of these courts, the appellants by appropriate procedure presented the contention that the New Jersey statutes, if construed as authorizing the levy of a tax based upon a transfer of interests in this trust fund to the appellants, violate the Fourteenth Amendment of the Constitution of the United States by depriving the appellants of their property without due process of law (R. 6-8, 58-61, 65).

In the New Jersey courts, the appellants also challenged the taxation of certain annuity insurance policies, but the decision on that point presents no federal question and is not involved in the present appeal.

The decedent was a resident of New Jersey both at the time of his death and at the time of the execution of the trust agreement. The Prerogative Court found as a fact that the trust agreement was executed in contemplation of death and intended to take effect in possession or enjoyment at or after death (R. 54). That finding is not questioned on this appeal.

The Question Presented.

The main question presented by this appeal is briefly this: Has the State of New Jersey constitutional power to assess and levy a transfer inheritance tax upon the transfer, pursuant to a trust indenture, of a trust fund held and administered entirely in the State of New York by a corporate trustee, incorporated under the laws of New York and doing business therein, to nonresidents of New Jersey whose rights, if any, in such trust fund had been theretofore only contingent, merely because the creator of the trust, who was also the life beneficiary thereunder, was at the time of its creation and at the time of his death a resident of New Jersey?

The New Jersey Statutes.

The courts of New Jersey, including the Court of Errors and Appeals in the judgment appealed from, have held that the State of New Jersey has this power of taxation by virtue of Sections 1 and 18 of

Chapter 228 of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935, and Section 12 of Chapter 303 of the Laws of 1931.

Said Section 1, as so amended, reads as follows:

"1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred ($500.) dollars, or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:

First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of real property within this State or of goods, wares and merchandise within this State, and the decedent was nonresident of the State at the time of his death.

Third. When the transfer is of property made by a resident, or is of real property within this State, or of goods, wares and merchandise within this State, made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *

Fourth. When any person or corporation comes into the possession or enjoyment, by a transfer from a resident or from a nonresident decedent, when such nonresident decedent's property consists of real property within this State or

of goods, wares and merchandise within this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by an instrument taking effect after the passage of this act, or of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of this act." (P. L. 1935, pp. 264-5.)

(N. B. The remainder of the section is believed immaterial to the present issue.)

Said Section 18, as so amended, reads as follows:

"18. In order to fix the value of property of persons whose estates shall be liable to the payment of a tax under this act, whether the same be in the ownership of a resident or nonresident decedent, the State Tax Commissioner on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and whenever occasion may require. Every such appraiser shall forthwith give notice, by mail, to such persons as the State Tax Commissioner shall direct, of the time and place when and where he will appraise such property. He shall at such time and place appraise the same at its fair market value, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make report thereof, and of such value, in writing to said State Tax Commissioner, together with such other facts in relation thereto as the said State Tax Commissioner may, by order, require, which report and other data required by said Commis-

sioner shall be filed in the office of such Commissioner, and from said report the said State Tax Commissioner shall forthwith assess and fix the cash value of such estate and levy the tax to which the same is liable, and shall immediately give notice thereof, by mail, to all parties known by said State Tax Commissioner to be interested therein. Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interests and costs, if the said tax be affirmed by the Ordinary. * * *." (P. L. 1931, pp. 763-4.)

The foregoing sections were in effect at the time the tax involved in the pending cause was levied. They are now incorporated in the Revised Statutes of New Jersey, 1937, as 54:34-1 and 54:34-6 to 13.

Specification of Errors to be Urged.

The appellants intend to urge errors 1 and 3 as set forth in their assignment of errors (R. 74, 75). These two errors relate to the same fundamental question, merely presenting the point separately as it affects each of the individual appellants. Error 1 is directed to the action of the Tax Commissioner with respect to the property transferred to George Chew Atkins and error 3 is directed to such action with respect to the property transferred to John Norton Atkins.

The point raised by both errors is that the New Jersey statute, as construed by the judgment ap-

pealed from, authorizes the taxation of transfers of property not within the jurisdiction of the state at the time of the transfer, and is therefore unconstitutional as depriving appellants of property without due process of law.

The form and manner in which this point was presented to the New Jersey courts and the action of those courts respectively thereon are fully set forth in the appellants' statement as to jurisdiction heretofore filed.

Substitution of Respondent.

The term of office of J. H. Thayer Martin as State Tax Commissioner having expired, William D. Kelly, his successor, was substituted as party respondent herein by order of the Court of Errors and Appeals (R. 68).

Summary of Argument.

Point I. The jurisdiction to tax any transfer of this property can rest only on the domicile of the decedent Atkins and his relationship to the property at the time of the transfer.

Point II. There was no taxable transfer from the decedent to these appellants at the time of the execution of the trust indenture.

Point III. The domicile of the decedent at the time of his death affords no basis for taxation of transfers made at that time.

POINT I.

The jurisdiction to tax any transfer of this property can rest only on the domicile of the decedent Atkins and his relationship to the property at the time of the transfer.

It is a fundamental and often declared principle of constitutional law that the subject matter of a state's power to tax is limited to persons and property within its governmental jurisdiction and that any attempt to tax beyond that jurisdiction partakes rather of the nature of an extortion than a tax, and is the taking of property without due process of law.

While the boundaries of such governmental jurisdiction have been the subject of many disputes, the principle itself is believed to have universal acceptance. Even before the adoption of the Fourteenth Amendment, Chief Justice Marshall had said, with reference to the taxing power:

> "But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."
>
> *McCulloch* v. *Maryland*, 4 Wheat. 316, at p. 429.

Thereafter, the Court spoke again through Harlan, *J.*:

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government."
>
> *Louisville etc. Ferry Co.* v. *Kentucky*, 188 U. S. 385, at p. 396.

It is unnecessary to multiply citations of cases in which the basic nature of the principle has been recognized. It has been applied not only to the direct taxation of property, but to the taxation of transfers of property, privileges and various other forms of excises and indirect taxation. The inability of a state to levy a property tax on land outside of its territorial boundaries has been stated from time to time by this Court, although scarcely the subject of controversy.

> *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, at p. 204;
> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, at p. 208.

The principle extends to tangible personal property.

> *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*;
> *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341.

The taxation of intangible personal property, such as stocks, bonds, bank accounts, credits and the like owned by a resident of the taxing state, but the documentary evidences of which are located in another state, has not been considered an exception to this principle, such intangibles being deemed to be physically located within the taxing state through the operation of the maxim *mobilia sequuntur personam*.

> *Union Refrigerator Transit Co. v. Kentucky*, *supra*, at p. 205.

But the operation of that maxim is not effective to give a state power to levy a direct property tax thereon where the resident of the taxing state has only an equitable interest therein, and the legal title is held elsewhere.

> *Brooke v. Norfolk*, 277 U. S. 27;
> *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83.

The same limitations which forbid the direct taxation of property outside of the state forbid the taxation of transfers of such property.

> *Frick v. Pennsylvania*, 268 U. S. 473;
> *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69.

It was said by Taft, *C. J.* in the latter case:

> "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a prop-

> erty tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred." (270 U. S. 69, at p. 80.)

While the quoted opinion continues by stating that in the case of intangibles a transfer tax may be levied by the state in which the owner resides, there is nothing in the context which would justify the extension of this exception, either to mere equitable ownership, or to no ownership whatever at the time of the transfer.

There is no single factor, the presence of which is always essential to give a state jurisdiction to tax either property or transfers of property. The constitutional power may, under a variety of circumstances, be based not only on the actual location of the property within the state's boundaries, or fictitious location at the domicile of the owner therein, but likewise on the established and fixed presence therein of intangibles belonging to a nonresident which have acquired a fixed or business situs within the state, or are there held in trust for nonresidents.

> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193;
> *Liverpool, etc. Ins. Co.* v. *Board of Assessors*, 221 U. S. 346;
> *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234;
> *Curry* v. *McCanless*, 307 U. S. 357.

Again, jurisdiction may sometimes be rested on the fact that the taxing state has through its own laws extended to the property some protection or benefit, for which it can ask return.

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435;
State Tax Commission v. *Aldrich*, 316 U. S. 174;
Blackstone v. *Miller*, 188 U. S. 189.

Sometimes domicile alone may be a sufficient basis for taxation, particularly in the cases of income taxation or inheritance taxation on the transfer of personal property owned by resident decedents at the time of death.

New York ex rel. Cohn v. *Graves*, 300 U. S. 308;
Lawrence v. *State Tax Commission*, 286 U. S. 276;
Blodgett v. *Silberman*, 277 U. S. 1.

Just as it cannot be said that the presence of any one of the above described factors is essential to the jurisdiction to tax, neither has it been said by this Court that such jurisdiction will be found to exist in every case provided any one of them is present, irrespective of the other facts and circumstances. Moreover, as one of these elements of jurisdiction may exist in one state while another of them is coexistent in a different state, both of such states may claim the right to tax the same property or transfer simultaneously. However undesirable double taxation may be from an idealistic point of view, it must be admitted that such taxation is not necessarily unconstitutional and the rights of the two states need not be mutually exclusive.

Curry v. *McCanless*, *supra*;
State Tax Commission v. *Aldrich*, *supra*.

In so far as the taxing power of the state is based upon the domicile of the owner of the property, it is analogous to the state's domiciliary control over other activities of its citizens.

> *Milliken* v. *Meyer*, 311 U. S. 457, at p. 463;
> *Skiriotes* v. *Florida*, 313 U. S. 69.

The domiciliary jurisdiction of a state to tax the transfer of property located outside of the state for the purpose of levying an inheritance transfer tax thereon has been extended to include the case of property not actually owned by the decedent at the time of his death, but over which he had some power of disposition, such as a power of appointment or a power of revocation of a previous gift, or otherwise.

> *Curry* v. *McCanless*, *supra*;
> *Graves* v. *Elliott*, 307 U. S. 383;
> *Graves* v. *Schmidlapp*, 315 U. S. 657;
> *Keeney* v. *New York*, 222 U. S. 525.

Beyond this point, however, this Court has not yet gone, and we submit that any statute purporting to tax a transfer of property owned and located outside of the state, simply because the transfer takes place upon the death of a resident of the state where such resident at the time of such transfer neither owned any transferable interest in the property nor had any power over it, is taxation without jurisdiction and a deprivation of property without due process of law. That is precisely the effect, as we shall proceed to show, of the New Jersey statute as interpreted by the courts of New Jersey in the case under review.

Of the three elements which have been described as affording a possible basis for jurisdiction to tax,

the one chiefly relied upon in the opinions of the New Jersey courts is that of the domicile of the decedent. It is said in the opinion of the Vice-Ordinary: "That property was admittedly intangible personalty; and the power to tax such property inheres in the state of the domicile and the owner thereof" (R. 36, ll. 8-10); and again: "The tax is *imposed on the transfers made by the present* deed of trust, because that deed was made by a resident of New Jersey" (R. 36, ll. 30-32); and again: "But, whatever the theory, it is certainly firmly established that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner a tax on the use and enjoyment of rights and intangibles measured by their value" (R. 43, ll. 31-35). The same reliance on domicile of the decedent appears repeatedly throughout the opinion of the Vice-Ordinary (R. 46, ll. 20, 35; R. 48, ll. 7, 12, 34; R. 51, l. 34).

It would be obviously hopeless for the appellee to contend that New Jersey would have any jurisdiction to tax a transfer of this property because of the actual location of the property, and equally hopeless for it to contend that there was even a fictitious location within the state because of the maxim *mobilia sequuntur personam*, except in so far as that maxim might acquire applicability from the fact of decedent's domicile in New Jersey. The securities which constituted the trust fund were actually located and held in New York from the time of the execution of the trust deed, and most of them had been there for at least five years prior to that time (R. 26). It does not appear that any of them had ever been in New Jersey. From the time of the execution of the trust agreement the title to these securities was in the

New York trustee and, if the above mentioned maxim has any value, their fictitious situs based on the domicile of the owner was in New York, as well as their actual situs.

Safe Deposit and Trust Company v. *Virginia*, 280 U. S. 83.

Nor can the State of New Jersey claim any taxing power for the transfer thereof at the time of decedent's death because of any privilege, protection or benefit conferred by the laws of New Jersey. The trustee, which was at least the owner of the legal title, was a New York corporation carrying on business there and administered the trust entirely in that state (R. 27). It did not have to seek the assistance of the New Jersey law to turn over and deliver the trust fund to these appellants when they became entitled thereto on the decedent's death. It did not have to account to any New Jersey court for its acts as trustee. New Jersey extended no protection to the property, either while in the hands of the trustee or while in the previous safekeeping account, nor did either the trustee or the trust property receive any other benefit from New Jersey or the laws thereof which could give rise even to a moral obligation to make any return in the form of a tax payment. The trustee was not even indebted to New Jersey for the privilege of receiving the fund at the time of the original transfer in 1929, for the transfer was made in the City and State of New York (R. 23). The trustee's powers to receive the fund were derived solely from the laws of the State of New York, under which it is incorporated, and the act of transfer had legal validity by virtue of those laws, rather than the laws of New

Jersey, both because the act took place in New York and because the trust agreement expressly provided that it should be construed "according to the laws of the State of New York, where it is made and where it is to be enforced" (R. 22). This provision for construction according to the law of New York undoubtedly applies not only to particular phrases and clauses in the agreement, but to the instrument itself as an effective act of transfer. While no question has arisen, so far as we are aware, relating to the construction of this instrument, or any suggestion that its meaning and effect are in any way different from what they would have been had it been governed by the laws of New Jersey, the point is mentioned merely to rebut any claim that the laws of New Jersey in some way contributed to the transfer that was made in 1929.

Not only did the trustee owe nothing to the laws of New Jersey when it took the trust fund in 1929, but the grantor, in making that transfer, exercised no privilege derived from the laws of the state in which he was domiciled. Had the trust deed been executed and the securities transferred in New Jersey, perhaps it could then have been said that in executing the deed and delivering the securities he exercised either a privilege or a right granted to him by the laws of the state to which he owed allegiance; but when he performed these acts in New York he performed them, not by virtue of the powers which he derived from the State of New Jersey, but by virtue of the rights and privileges granted by New York to its own citizens and which the grantor, as a citizen of another state, was entitled to enjoy by virtue of

Article IV, Section 2, of the Constitution of the United States.

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

U. S. Constitution, Article IV, Section 2;
Ward v. *Maryland*, 12 Wall. 418;
Paul v. *Virginia*, 8 Wall. 168.

Accordingly, no foundation for any jurisdiction of the State of New Jersey to tax the transfer of the Atkins trust fund can be discovered in any legal right or economic benefit contributed by New Jersey. Nor do we understand that any such contention has been put forward either by the appellee or by the New Jersey courts, except in so far as such contention may be involved in arguments based on the decedent's domicile. The case bears no resemblance in this respect to *State Tax Commission* v. *Aldrich*, 316 U. S. 174, and *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435.

It follows that the only theory for sustaining the tax statute under review, which requires further consideration, is the theory of domiciliary jurisdiction based either on Atkins' residence at the time of the execution of the trust agreement or at the time of his death. The two branches of this theory will now be considered separately.

POINT II.

There was no taxable transfer from the decedent to these appellants at the time of the execution of the trust indenture.

The opinion of the Prerogative Court reveals some uncertainty of view as to what particular transfer is held subject to the tax and as to when such transfer took place. Some portions of the opinion indicate a theory that a transfer to the future beneficiaries took place immediately upon the execution of the trust deed and that the transfer which then took place was that of an equitable remainder. Other portions of the opinion indicate that the transfer to the appellants took place at the death of the decedent, who was both grantor and life beneficiary. In still other portions of the opinion the suggestion is advanced that the taxable transfer took place in two stages, being commenced by the execution of the trust deed and completed on the decedent's death. The first of these three theories will be considered in the present subdivision, the other two being treated hereafter.

The theory that the transfer on which the tax is levied was one made by the grantor in the trust agreement at the time of its execution is expressed in the opinion as follows:

> "The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title of the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, *and also a transfer, at the same time*, of an equitable interest of contingent remainder therein, to the two sons." (R. 46, ll. 18-23; emphasis supplied.)

And again—

> "* * * It necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him *at the time he executed and delivered the deed.*" (R. 47, ll. 40-43; emphasis supplied.)

The selection of the execution of the deed as the taxable event is even more definitely indicated by the Court's suggestion that the continuance of the grantor's domicile in New Jersey until his death was an immaterial fact (R. 48).

The Commissioner Has Not Taxed the 1929 Transfer.

In appraising this theory of the taxable transfer it is appropriate to point out that the tax which has actually been levied upon the decedent's sons is not in fact one that is based upon an equitable future interest in property transferred to them in 1929, when the trust deed was executed, but upon property which they became entitled to receive from the trustee on the death of the life beneficiary in 1936. This appears very clearly from a comparison of the summary of Schedule A annexed to the trust agreement with the inheritance tax return and with the Commissioner's analysis of the tax. The actual value of the property transferred in 1929 is nowhere computed or appraised, the par value alone being stated in Schedule A of the agreement as amounting to $389,000, plus one item in francs (R. 24). The property described in the tax return, however, and the values set forth therein, upon which the appraiser acted, were listed as they existed at the time of the death (R. 12), at which time the net value of the trust fund was $377,962.04. It will be noted that this sum is almost

precisely equal to twice the figure of $188,458.52 shown on the tax return as the value of one-half of the trust fund apportioned to each of the sons in the Commissioner's computation of the tax (R. 24-25). (The reason for this slight difference does not appear in the record, but we believe the appellee will not deny that it was due merely to the rejection of the valuation of one item listed in the tax return.)

This actual appraisal of property transferred and assessment of a tax on the transfer thereof, based upon the contents of the trust fund and their values at the time of decedent's death, is not only inconsistent with the Court's declarations that the taxable transfer took place on the execution of the trust deed, but it is also in conflict with the provisions of the statute which would have been applicable had the transfer taken place at that time. This statute, which is part of Section 3 of the Transfer Inheritance Tax Law of New Jersey, reads as follows:

> "*Executory devises or contingent or defeasible estates in expectancy.* When an instrument creates an executory devise, or an estate in expectancy of any kind or character which is contingent or defeasible, the property which is the subject of such devise or in which such contingent or defeasible interest is created shall be appraised immediately at its clear market value. The life estate or estate for a term of years shall be valued in accordance with section 54:36-2 of this title, and if taxable, the tax shall be assessed and levied thereon immediately and shall be immediately due and payable. Thereupon, the value of the estate for life or term of years shall be deducted from the appraised value of the property which is the subject of such devise or

limitation and the tax on such balance of the estate shall not be levied or assessed until the person or corporation entitled thereto comes into the beneficial enjoyment, seizin or possession thereof, at which time, if taxable under the provisions of chapters 33 to 36 of this title (§54:33-1 *et seq.*), it shall be taxed."

Laws of 1909, Chapter 228, Section 3 as amended by *Laws of 1918*, Chapter 283, Section 2, and *Laws of 1931*, Chapter 303, Section 2; *Revised Statutes of N. J. 1937*, 54:36-3.

If there were any validity in the theory that the taxable transfer to the appellants took place when the deed of trust was executed, the property transferred to the trustee should have been appraised at its then value and the interest of the appellants therein calculated by deducting from such appraisal the value of the life trust. But it is the established New Jersey law that in the case of a gift in contemplation of death, or to take effect at death, the transfer tax is to be levied as at the death of the grantor.

"The tax is a transfer tax at death."

Wimpfheimer v. *Martin*, 126 N. J. L. 502.

And to the same effect:

City Bank Farmers Trust Company v. *Martin*, 126 N. J. L. 506;
Nicholas v. *Martin*, 127 N. J. L. 35.

Moreover, it has been, heretofore at least, the accepted theory of the New Jersey statute that the tax is levied on the privilege of receiving the property.

"The statute levies an excise on the right or

privilege of succeeding—as distinguished from the right of transmission—to the possession or enjoyment of property or an interest therein. (*Turner* v. *Cole*, 118 N. J. Eq. 497.) The privilege of succession—the 'shifting of the economic benefits and burdens of property'—is the thing taxable under the statute."

Hartford v. *Martin*, 122 N. J. L. 283, at p. 286.

There is nothing in the language of the Court of Errors and Appeals in the present case to indicate any intention of modifying the established doctrine.

The purpose of citing these decisions and this section of the New Jersey statute is not to contend that the method of assessment in the present case was improper, or that the statute has been erroneously construed, but to emphasize the confusion inherent in these portions of the Prerogative Court's opinion which maintain that the transfer to these individual appellants took place at the execution of the trust deed. We do not of course assert that there was no transfer of any kind at that time, the title to the securities having been undoubtedly transferred entirely out of the ownership of the New Jersey domiciled grantor into the ownership of the New York domiciled trustee. We do contend, however, that there was no taxable transfer at that time to these appellants.

The Appellants' Future Ownership Was Speculative.

In 1929 the relationship of these appellants to the future ownership of the trust fund was entirely speculative and contingent. By the terms of the trust

deed they would take nothing unless they survived both parents. If they did survive, they would take immediately upon the death of the life beneficiary; if they did not survive, the property would go elsewhere. The following is the language of the deed of trust with respect to the dispositions to be made upon the death of the grantor in case his wife should predecease him, as she did (R. 20):

> "(b) In case the Grantor's wife shall not survive the Grantor, the Trustee shall, upon the Grantor's death, divide the trust estate into equal shares, to be disposed of as follows:
>
> In case George shall survive the Grantor, the Trustee shall transfer, assign and pay over to George one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor). In case George shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita*, one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor).
>
> In case John shall survive the Grantor, the Trustee shall transfer, assign and pay over to John one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor). In case John shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita*, one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor);

(e) In case neither the Grantor's wife, nor George nor issue of George, nor John nor issue of John, shall survive the Grantor, the Trustee shall transfer, assign and pay over the entire trust estate to the Grantor's brother, John W. Atkins, if then living, or if not living, then to the other heirs at law and next of kin of the Grantor."

This Court has warned against importation into tax cases, especially those involving estate taxes where there have been *inter vivos* trusts, argument based on the "niceties of the art of conveyancing, or the law of contingent or vested remainders".

Klein v. *U. S.*, 283 U. S. 231, 234.

We have also recently been reminded that the "law of contingent and vested remainders is full of casuistries".

Helvering v. *Hallock*, 309 U. S. 106, 117.

Accordingly we shall not attempt to follow the New Jersey court and seek a definite answer to the problem of describing in legalistic terms the prospects of the grantor's sons with respect to the future enjoyment of this property. Indeed, no such precise classification or definition is believed to be necessary. It is indisputable, however, that any rights which these sons may be said to have had during the continuance of the life trust were clearly defeasible. Enjoyment was subject in each case to a condition precedent, namely, survivorship. There was ground for reasonable expectation no doubt, in view of common experience that sons usually outlive their fathers, but there was nothing definite or certain about it.

There was nothing which could be called a definite right in property. Their situation is not strengthened by characterizing it as ownership of a contingent remainder, or even of a remainder vested subject to being divested. Where the future ownership of property remains in suspense and there is uncertainty as to its ultimate enjoyment, the law has for convenience usually denominated such future interest as a contingent remainder, but where the uncertainty is not only as to the time of enjoyment but as to the identity of the person to whom the enjoyment will come, such remainder is not so much a property right as a possibility and a hope. Until this hope develops into a vested interest, we submit that there is no property which has been the subject of a transfer.

If the term "remainder" is to be used at all in connection with the prospective relationship of the sons to the property during their father's lifetime, and it is deemed necessary to distinguish between a defeasible remainder that is called contingent and one that is called vested subject to being divested, we believe that it would be more technically correct in the present instance to use the former term than the latter, equally under the general law, the law of New Jersey and the New York statutes. Particularly is this true in New York because of the express direction to divide and pay over.

Klein v. *United States*, 283 U. S. 231;
Gifford v. *Thorn*, 9 N. J. Eq. 702;
Teets v. *Weise*, 47 N. J. L. 154;
Delafield v. *Shipman*, 103 N. Y. 463;
Matter of Crane, 164 N. Y. 71;
Wright v. *Wright*, 225 N. Y. 329.

The importance of the distinction between defeasible and indefeasible future interests from the point of

view of the constitutionality of taxation was recognized by this Court in *Binney* v. *Long*, 299 U. S. 280, in which was involved the validity of an inheritance tax levied under the Massachusetts statutes upon the interests of persons succeeding to property upon the death of a life beneficiary under a deed of trust. The tax was sustained because the succession interests had been merely contingent at the time of the enactment of the legislation, and the case was distinguished from the previous decision in *Coolidge* v. *Long*, 282 U. S. 582, dealing with the same statute, where the remainders attempted to be taxed were already vested in interest when the law was passed. Thus the court in effect held that the so-called owner of a contingent future interest has nothing which is entitled to protection against taxation by subsequent legislation.

In the opinion of the Prerogative Court it is argued that there was a definite property right transferred to the appellants by the execution of the deed of trust, even though the entire legal title passed to the trustee, namely, something called an equitable remainder. We have shown that, no matter what may have passed at that time from the grantor, nothing then passed to the individual appellants, his sons, or to any other person except the trustee, because the identity of the future owners of the property remained to be disclosed by the development of events. Under these circumstances there could not have been any equitable remainder in existence separate and apart from the legal title if the term implies a right in the property itself. It is difficult to see how there can be a right in property without an owner; and even the conception of some different form of right, such as a right *in personam* or a chose in action, con-

notes the existence of some one to whom the right belongs. But until the death of the life beneficiary the relationship of these appellants and of all others who might possibly succeed to the property remained *in futuro*.

> "It must be an object of no small curiosity to understand how a remainder can pass from a donor until there exists some donee to receive it of him; if it passes at all, the conclusion rather seems to be, it passes to somebody; and whilst it does not pass to anybody, one might suppose it does not pass at all."
>
> *Fearne on Contingent Remainders*, p. 361.

In the passage quoted the author was criticizing the common law view, expressed by Blackstone, that pending the termination of a legal life estate, the remainder being contingent, the ownership of the fee was in abeyance (2 Bl. Comm. 107). He was not discussing the situation resulting from the transfer of the entire legal title to a trustee, a situation in which the necessity of implying the retention of an interest in the grantor would not arise. Elsewhere Blackstone pointed out that the conveyance of legal title to a trustee was a method of preventing the owner of the life estate from destroying the contingent remainders (2 Bl. Comm. 171). Both writers agree therefore that nothing of substance passed to contingent remaindermen at the time of the execution of the deed.

Pending the Contingency the Entire Ownership Was in the Trustee.

If a contingent legal remainder is not property which can pass to remaindermen until the resolution of the contingency, a so-called contingent equitable remainder is still less a subject of transfer. There has been much discussion concerning the nature of equitable interests under trusts and particularly whether they are to be classified as rights *in rem* or as rights *in personam* against the trustee.

1 Scott on Trusts, Section 130;
17 Columbia Law Rev. 467.

Also, authorities have differed as to whether in the creation of a trust, with a life interest and with dispositions to take effect after the termination of the life interest, the future beneficiaries take any legal title in remainder even when the remainders are vested, or whether the entire legal title is in the trustee. A distinction in this respect is drawn by the American Law Institute between real and personal property, an interest of unlimited duration being attributed to the trustee in the latter case but not in the former, unless a different intention is manifested.

Restatement, Trusts, Vol. I, §88.

See also:

1 Scott on Trusts, p. 487.

No such distinction exists under the law of New York, by the laws of which state the Atkins trust deed is according to its express provisions to be

interpreted, and by such law it is clear that the trustee of an express trust takes the entire legal estate "subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust".

New York Real Property Law, Section 100; *N. Y. Personal Property Law*, Section 11; last sentence.

While it is further provided that the section just quoted shall not prevent the creator of a trust "from declaring to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust", and that "such a grantee or devisee shall have a legal estate in the property against all persons except the trustees and those lawfully claiming under them" (Real Property Law, Section 101), this qualification is inapplicable to the Atkins trust deed for the reason that the grantor refrained from declaring at the time of the execution of the deed to whom the property should belong upon the termination of the trust, but left the determination of the future ownership dependent upon the outcome of events. For seven years after the execution of the deed there was no one who could claim to be the grantee of any future interest either legal or equitable.

Whatever the rule may be regarding the rights of future beneficiaries of indefeasibly vested remainders created by deeds of trust, it has been clearly held in New York that where succession to the future interests is contingent with respect to the individuals who

will eventually become entitled, the prospective remaindermen are not necessary parties to a foreclosure of a mortgage on the trust property, because the trustee in such a case is vested with the entire title, both legal and equitable.

United States Trust Co. v. Roche, 116 N. Y. 120;

Townshend v. Frommer, 125 N. Y. 446.

Unborn contingent remaindermen need not be represented in an action to nullify the trust.

Bloke v. Mattera, 186 App. Div. 488.

Even if in existence, contingent remaindermen are barred by the same claims of adverse possession which defeat the trustee, for the reason that the entire title is in the latter, both legal and equitable.

Bennett v. Garlock, 79 N. Y. 302.

In each of the foregoing New York cases the subject matter of the trust was real property. The same principle is applied in trust funds of personalty, it being said in one case:

> "In trusts of this character, we think it must be considered that the whole title to the trust fund is in the trustee, and that all the remaindermen have is the right to an account."

Rhodes v. Caswell, 41 App. Div. 229, 234.

The unsoundness of the argument that a transfer to a contingent remainderman takes place at the creation of the trust rather than at the end of the life interest, or at least the determination of the con-

tingency, is demonstrated by the situation presented where the contingent remaindermen are not in being when the trust is created. If a trust is created by A for the benefit of his daughter B for life, the principal upon her death to be divided among her children then surviving, B having no children at the time of the execution of the trust agreement, how can it be said that there is any transfer to them at that time?

Cases Relied on by the Appellee.

The New Jersey Tax Commissioner in support of his motion to dismiss this appeal relied strongly on *Pearson* v. *McGraw*, 308 U. S. 313. In that case the main question argued was whether federal reserve notes held by an Illinois trust company under a trust created by the decedent, domiciled in Oregon, were subject to an Oregon transfer inheritance tax on the death of the creator of the trust. The trust was irrevocable, without any reserved power of disposition or control. The creation of the trust and the transfer to the trustee had admittedly been made in contemplation of death, and was therefore subject to an inheritance tax under the Oregon statute unless exempt for constitutional reasons. It was argued that the federal reserve notes should be considered as tangible property and therefore beyond the taxing jurisdiction of Oregon, but the majority of the court held it was unnecessary to consider this question because the purchase of the notes had been accomplished through sale of other property with respect to which it did not arise, both transactions being part of a single plan to evade taxation. No question was involved concerning the time as of which the property should be appraised or as to the identity of the trans-

fer which was to be made the subject of the tax, because the tax had not in fact been assessed. It appears in the printed record, moreover, that no life interest was reserved to the grantor, but the main beneficiaries under the deed of trust acquired their interest immediately upon the execution of the trust deed, and the determination of the future beneficiaries was in no way contingent upon the death of the grantor.

Furthermore, we read the record on appeal in the *Pearson* case as showing that the respective beneficiaries of the trusts there under consideration were taxable in accordance with the quality and value of such interests as they existed at the time of the execution of the trust deed, *i. e.*, as present or future, as life interests or as remainders. This was in harmony with the theory of taxation of a present transfer from the Oregon domiciliary and in contrast with valuation procedure adopted by the Tax Commission of New Jersey in the present instance.

Another case relied upon by the appellee in his motion to dismiss or affirm is *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605, in which a motion to affirm had been granted by this court upon the authority of *Pearson* v. *McGraw*. In the *Van Dyke* case, however, the tax involved was a gift tax, not an inheritance tax. It appears from the record that the donees received their interests immediately upon the execution of the trust agreements, the donor having reserved no life income or other interest in himself except possible rights of reversion in case of the death of the beneficiaries without issue, in default of appointment, or in other remote contingencies. The subject of the tax was not a transfer effective upon

the termination of a life interest or of any other future connection of the grantor with the subject of the tax, but was the immediate gift itself, as of the date thereof. It should be remarked, moreover, that not only the donor but also the trustee-donees were residents of Wisconsin, and, while it is not so directly stated in the case, it may be inferred that the same thing was true of all the beneficiaries. The residence of the trustees in the state imposing the tax is in itself sufficient to show that the case has no bearing upon the problems now under consideration.

Another significant feature of both *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission* not present in the case now before the Court, is that the transfers involved were obviously parts of a plan to evade taxation. No such inference can be drawn from the present record, nor was it even suggested in the findings or opinions of any of the New Jersey courts. It was merely held that the trust deed was executed in contemplation of death, which may be a very different thing and quite innocent of improper connotations. In the *Pearson* case the federal reserve notes had been purchased with the purpose of contending that as tangible personal property they were not subject to the principle of *mobilia sequuntur personam* as applied in tax cases (*Blodgett* v. *Silberman*, 277 U. S. 1). In the *Van Dyke* case, with a similar purpose, the subject matter was converted into the inconvenient and significantly abnormal form of seven and one-half tons of silver dollars.

We submit therefore that the New Jersey inheritance tax statute as applied to these appellants

cannot be sustained on the theory that a transfer to the appellants took place at the time of the execution of the trust deed.

POINT III.

The domicile of the decedent at the time of his death affords no basis for taxation of transfers made at that time.

In some portions of its opinion the Prerogative Court has waivered from the view that the taxable transfer was completed upon the execution of the deed of trust and suggests the theory that perhaps the transfer only commenced at that time, being completed and becoming effective upon the decedent's death. Still elsewhere the chief emphasis is laid upon the decedent's death as the time of transfer. For example it is said:

> "That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency is not true" (R. 47, ll. 9-13).

And again:

> "It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; * * *" (R. 47, ll. 27-29).

And again:

> "Perhaps indeed it might be argued * * * that therefore no transfer—because no completion of

the transfer—occurred until the actual vesting at the death of the grantor" (R. 51, ll. 21-28).

While the thought underlying the first two of these quotations is not entirely clear, it is impossible to believe that the Vice-Ordinary conceived of the transfer as a prolonged process in which every moment was of equal significance. The taxable event must be found at one point or another, at *the beginning or* the end. The situation is similar to the one upon which this Court, in discussing a revocable deed of trust under the federal tax law, expressed itself as follows, by Cardozo, *J.*:

> "Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other."
>
> *Burnet* v. *Guggenheim*, 288 U. S. 280, at p. 285.

Throughout most of his opinion the Vice-Ordinary chose the execution of the deed as the taxable event, and in the preceding point of this brief we have replied to the contentions involved in that theory. We shall now discuss the other theory, both implied in the idea of a continuing transfer and expressly set forth in the third of the foregoing quotations from the opinion of the Prerogative Court, viz., that the transfer took place at the death of the decedent, or

at least that its completion at that time created a taxable event.

If anything that took place at the time of Mr. Atkins' death is pointed to as a taxable event, it was no act of his, nor was it even any failure on his part to take action. After Mr. Atkins had transferred the property to the trustee under the trust agreement in 1929 he had no remaining ownership or title therein, present or future, nor had he any power to affect in any way the course of the devolution of such ownership or title in the future. There was no reserved power of revocation or of appointment, nor did he retain any power over the administration of the trust fund. He had not named himself as a co-trustee or retained any power to name a substitute or successor trustee. The only provision for any relationship whatever to the trust fund, other than the receipt of income therefrom, was the following, viz.:

> "During the lifetime of the grantor, the trustee shall, except in case of emergency, or during the absence or disability of the grantor, consult with the grantor in reference to the sale or other disposition of trust property for the investment or reinvestment of trust funds" (R. 22, ll. 33-37).

Obviously this was not a limitation on the absolute powers of the trustee, but merely a direction for consultation in order that the grantor, if available, should have an opportunity to express his views; the grantor was given no power of veto over the trustee's proposals, nor was his concurrence required for the execution thereof. Full and complete powers of investment were given to the trustee and to the trustee alone (R. 21-22).

The grantor Atkins had of course during his life a right to receive the full net income from the trust (R. 18), but this right did not give him any estate or interest in the property itself, the full title thereto being in the trustee alone.

New York Real Property Law, Section 100.

It is true that upon the death of the life beneficiary the economic benefit of the trust shifted to the appellants. This event definitively settled the succession to the property in the appellants because of their survivorship, such succession having been theretofore undetermined and contingent; and at the same time the appellants acquired the right to the immediate possession of the fund subject only to the distribution and the trustee's accounting. But this transfer of economic benefit, we submit, was not a transfer of anything proceeding out of or from the decedent at that time. The rights which then for the first time came to the appellants were not the same thing which the life beneficiary had theretofore enjoyed, whether it be called property, interest, or right, for the latter was entitled only to the income and not to the fund itself, and even as to such income his status was that of an owner of a right *in personam* against the trustee. It was something very different that the appellants received at the decedent's death, something that was not then owned by the decedent.

At the time of this shift of economic benefit to the appellants on the death of the grantor, the property itself was clearly outside of the jurisdiction of New Jersey. The full legal title was and had been for some years in the New York trustee. Both the actual situs and the ownership were in that state.

and there was no New Jersey ownership with which to construct a fictitious situs through the maxim *mobilia sequuntur personam*.

No decision of this Court has gone so far as to hold that the domicile of the life beneficiary of a trust is sufficient foundation to give the state of such domicile constitutional jurisdiction to tax the shifting of the economic benefit of the trust from the life beneficiary to the remainder when the trust fund is held outside of the state by a foreign trustee and the remaindermen are nonresidents. None of the recent decisions of this Court support that proposition.

In *Curry* v. *McCanless*, 307 U. S. 357, the power of Tennessee to tax the transfer of the trust fund in Alabama was based upon the life beneficiary's power of appointment. In that case Mr. Justice Stone said in delivering the opinion of the Court (p. 372):

> "If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile, which gives power over them and hence 'jurisdiction to tax', and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee."

A similar result was reached in *Graves* v. *Schmidlapp*, 315 U. S. 657, where the decedent transferred the property at his death through the exercise of a

power of appointment given him by the will of a nonresident over property located outside of the taxing state. The basis of jurisdiction was summarized by the court in the following language (p. 664):

> "Here the relationship of the power to Massachusetts does not leave New York without sufficient control over the donee and his exercise of the power to support its constitutional authority to tax. For the fact remains that he, as a resident enjoying the protection of New York's laws and owing to it the duty of financial support, has disposed of wealth by a will executed and probated in New York with the same result as if he had owned the property. This transmission of wealth at death by a resident is not a forbidden source of revenue to the state."

Likewise, a transfer tax is permissible on the transmission of property located outside of the state where it was held under a trust fund subject to a power of revocation by the donor, a domiciliary of the taxing state, even though such power remained unexercised at the time of his death.

Graves v. *Elliott*, 307 U. S. 383.

The same principle had been earlier applied in the case of a revocable trust.

Baldwin v. *Wisconsin*, 240 U. S. 625.

Even where the decedent's power over the property at the time of his death was limited to the power to change beneficiaries, excluding himself and his estate from the range of choice, a transfer tax at his death with respect to property which he had conveyed in trust during his life was sustained.

Porter v. *Commissioner*, 288 U. S. 436.

This last case, however, dealt only with the construction of the federal estate tax law and involved no question of domicile or sovereignty.

Also a taxable event occurs upon the execution by will of a power of appointment, even though the power is not general but only special.

> *Whitney* v. *State Tax Commission*, 309 U. S. 530.

The principle underlying all of these decisions is declared to be that the power of disposition of property is the equivalent of ownership.

> *Graves* v. *Elliott*, *supra*, at p. 386;
> *Curry* v. *McCanless*, *supra*, at p. 371;
> *Graves* v. *Schmidlapp*, *supra*, at p. 660;
> *Baldwin* v. *Wisconsin*, *supra*, at p. 630.

As already stated, however, the decedent, Atkins, at the time of his death had no power whatever over the trust fund held under the trust which he had created in 1929. If the contention should be made that the mere shifting of the economic benefit from the life beneficiary to the remainder can be made the occasion of a transfer tax by the state of the life beneficiary's domicile, it would appear to make no difference where or by whom the trust was originally created. For example: If A, domiciled in Virginia, should transfer property located in that state to a trustee domiciled therein in trust to pay the income for life to B, a resident of Pennsylvania, the principal upon the death of B to be distributed to residents of California, would it be held that Pennsylvania has a right to impose a transfer tax, on the occasion of B's death, payable either by A, or by

B's estate, or by the ultimate distributees in California?

The concluding paragraph of the opinion of the Prerogative Court suggests that there may have been a transfer out of the decedent at the time of his death of an equitable remainder interest of which he was still the owner until the time of the happening of the contingency which would determine the ultimate devolution (R. 51). We submit that this suggestion is fallacious in the assumption that there was any such undisposed of remainder. The situation is not like that which is found when a testator omits to provide against the failure of all contingencies, with the result that under some circumstances the property may turn out to be undisposed of and the testator to have died, as to such property, intestate. Here the trust deed provided for all contingencies: if neither the grantor's wife, nor either of his sons, nor any issue of his sons should survive him, then the fund is to be paid over to the grantor's brother John; and if John too should be dead, then by the express wording of the deed it is to be paid to the other heirs at law and next of kin of the grantor (R. 20). No contingency is unforeseen, none is left unprovided for. Consequently nothing remained in the grantor subject to his power of disposition at death.

In this connection the Vice-Ordinary has cited *Curry* v. *McCandless*, *supra*, and *Graves* v. *Elliott*, *supra*. As already pointed out, neither of those cases supports his thesis, as in both of them the taxing power of the domiciliary state is sustained on the decedent's reserved powers to control the future ownership, powers which continued down to the very moment of death. Here there was no such power; it had all been surrendered in the deed of trust.

Moreover, the ownership of any such limited equitable interest would not be sufficient to draw the entire property within the taxing power of the state of domicile through the *mobilia sequuntur personam* fiction.

Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83;
Brooke v. Norfolk, 277 U. S. 27.

Conclusion.

The argument made herein for the appellants can be summed up as follows:

The jurisdiction of New Jersey to tax this property or the transfer thereof obviously cannot be based upon the actual location or situs of the property, which was in New York, or upon any protection or privilege derived from the laws or government of New Jersey. Jurisdiction to tax can be based only on the decedent's New Jersey domicile, either to give the property a fictitious location in New Jersey under the maxim *mobilia sequuntur personam* or because of some relationship of the decedent to the property at the time of his death. But no transfer to these appellants took place at the execution of the deed of trust, because their future relationship to the property was wholly speculative and contingent, and the entire title, legal and equitable, was vested in the trustee pending the determination of the contingencies. When the eventual transfer to the appellants took place at the decedent's death, the latter had parted not only with ownership but with every vestige of control, and the ownership as well as the property was located entirely outside of the state. New Jersey's

attempt to tax the transfer is accordingly a denial of due process of law in violation of the Fourteenth Amendment.

The judgment appealed from should be reversed and the cause remanded for reassessment of the tax with instructions to exclude the trust fund.

Respectfully submitted.

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